No. 80076-6

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Court of Appeals No. 56614-8-I

JOSEPH A. SIMONETTA and JANET E. SIMONETTA,
Plaintiffs/Appellants/Respondents on Review,

v.

VIAD CORP,
Defendant/Respondent/Petitioner on Review,

ON REVIEW FROM THE COURT OF APPEALS, DIVISION I

VIAD CORP'S RESPONSE TO AMICUS BRIEF OF SCHROETER GOLDMARK & BENDER

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I. INTRODUCTION

Respondent Viad Corp ["Viad"] files this Brief in response to the Amicus Brief of Schroeter Godmark & Bender ["SGB"]. SGB's contention that foreseeability gives rise to a duty is misplaced, and this Court has previously rejected this precise argument in other cases. The concept of foreseeability serves to define the scope of the duty *only after* a duty is found to exist. Because Griscom-Russell was not within the chain of distribution of asbestos insulation, the existing law in Washington and elsewhere does not support the finding of a duty. Therefore, the question of whether Griscom-Russell knew that its evaporator might be used in connection with asbestos containing insulation is immaterial to the outcome of this case.

Further, SGB's attempt to analogize Griscom-Russell's evaporator to such products as gas ignition grill, Clorox bleach, or Levitra is misplaced. The dangers associated with these products were enhanced when used in conjunction with other substances, whereas the application of asbestos insulation did not enhance any dangers inherent in the evaporator. Griscom-Russell's evaporator was not defective, it did not fail in its intended purpose, and its operational principles did not change with the addition of insulation. The danger arose exclusively from asbestos insulation.

II. ARGUMENT

1. Foreseeability does not create a duty where such duty did not exist in the first place

SGB argues that foreseeability of harm can give rise to a duty to warn. This argument finds no support in the law in this jurisdiction. *See e.g. Schooley v. Pinch s Deli Market, Inc.*, 134 Wn.2d 468, 475, 951 P.2d 749 (1998)(holding that concept of foreseeability serves to define the scope of the duty after a duty is found to exist).

Without conceding that the use of asbestos insulation was foreseeable to Griscom-Russell,[1] Viad submits to this Court that the issue of foreseeability is immaterial to the question of whether Griscom-Russell had a duty to warn. Washington case law is transparently clear that before a jury is allowed to determine whether an injury was reasonably foreseeable, the court must determine whether a legal duty existed. "If there is no duty, appellants have no claim." *Burg v. Shannon & Wilson, Inc.*, 110 Wn. App. 798, 804, 43 P.3d 526 (2002). Because Griscom-Russell was not

[1] As argued in Viad's Supplemental Brief, the record does not support the Court of Appeals' characterization as "undisputed" of Griscom-Russell's knowledge that its evaporator would necessarily be used with asbestos insulation. Neither party moved the trial court to make a factual determination as to whether the evaporator could properly operate without insulation, whether alternates to asbestos insulation were used by the Navy, and whether Griscom-Russell knew or should have known that its evaporators would be insulated with asbestos-containing materials. In any event, the question of what Griscom-Russell knew or should have known is properly left for a jury to decide. "Foreseeability is normally an issue for the trier of fact and will be decided as a matter of law only where reasonable minds cannot differ." *Christen v. Lee*, 113 Wn.2d 479, 492, 780 P.2d 1307 (1989).

within the chain of distribution of asbestos insulation, under Washington strict liability and negligence law it had no legal duty to warn of asbestos dangers. The fact that Griscom-Russell could have known that asbestos insulation might be used in connection with its evaporator does not change this legal principle.

The existence of a duty is a question of law and depends on mixed consideration of logic, common sense, justice, policy, and precedent. *See e.g. Snyder v. Med. Serv. Corp.*, 145 Wn.2d 233, 243, 35 P.3d 1158 (2001). This Court did not list foreseeability as one of the factors because under well-settled Washington law "[foreseeability] does not independently create a duty." *Halleran v. Nu West, Inc.*, 123 Wn. App. 701, 717, 98 P.3d 52 (2004). Rather, it "limits the scope of a duty." *Id.*

SGB's argument is inherently flawed in that it fails to recognize the fundamental distinction between the *existence of a duty* and *the scope of a duty.* (The courts sometimes describe the latter as the question of whether a plaintiff falls within a protected class.) This distinction is absolutely critical to the proper analysis of the duty to warn. In the instant case, the threshold inquiry is whether Griscom-Russell can owe a duty to warn of hazards associated with another manufacturer's product, *i.e.* asbestos insulation. Accordingly, first the court must determine whether a duty can exist. *Bernethy v. Walt Failor's, Inc.*, 97 Wash.2d 929, 933, 653

P.2d 280 (1982). If and when this initial determination of legal duty is made, is it the jury's function to decide the foreseeable range of danger thus limiting the scope of that duty. *Id.*

> When a duty is found to exist from the defendant to the plaintiff then concepts of foreseeability serve to define the scope of the duty owed.

Burkhart v. Harrod, 110 Wn.2d 381, 395, 755 P.2d 759 (1988). Because Griscom-Russell did not manufacture and supply asbestos insulation, it bore no duty to warn Simonetta, and the question of whether Simonetta's harm was foreseeable is not relevant.

The cases SGB cites are readily distinguishable. In *Keller v. Spokane,* 146 Wn. 2d 237, 44 P.3d 845 (2002), the issue was whether a municipality's duty to build and maintain safe roads ran to negligent drivers. *Id.,* 146 Wn. 2d at 249. The city did not dispute the existence of a duty, but rather attempted to limit the scope of such duty to persons using the highways in a non-negligent manner. The *Keller* court applied the foreseeability of harm to determine the scope of the duty, concluding that "a municipality owed a duty to all persons, whether negligent or fault-free" because "the general type of harm that occurred was foreseeable." *Id.* 146 Wn. 2d at 248-9. *Keller* provides an example where this Court used foreseeability as a mechanism to determine the scope of a duty that already existed. Contrary to SGB's argument, *Keller* does not stand for

the proposition that foreseeability gives rise to a duty, where there is no duty to begin with.

In *Harbeson v. Parke-Davis, Inc.*, 98 Wn.2d 460, 656 P.2d 483 (1983), the plaintiffs brought a medical malpractice lawsuit for failure to warn that Dilantin medication could cause developmental retardation in a fetus. The Supreme Court analyzed plaintiffs' wrongful birth and wrongful life claims separately. As to the wrongful birth cause of action, the court stated that the advent of medical science and the ability to detect defects in the unborn fetus justified the imposition on healthcare providers of a duty "to impart to their patients material information as to the likelihood of future children's being born defective, to enable the potential parents to decide whether to avoid the conception or birth of such children." *Id.*, 98 Wn.2d at 472. The court did not couch this analysis in terms of foreseeability and did not consider the foreseeability of harm in its analysis of the wrongful birth claim. It did not even use the term "foreseeability" in its discussion.

With respect to the wrongful life claim, the court applied foreseeability to determine whether a duty of care extended to persons not yet conceived at the time of a negligent act, noting that the scope of a duty is limited by the element of foreseeability. *Id.*, 98 Wn.2d at 480-81. Because the defendant physicians were aware of the plaintiff's pregnancy,

the future children were foreseeably endangered and fell within the protected class. *Id.* The issue before the court was not the existence of a duty, but its scope.

Kaiser v. Suburban Transportation Sys., 65 Wn.2d 461, 398 P.2d 14 (1965) is also inapposite. In *Kaiser*, a bus passenger sustained an injury when the bus struck a telephone pole. *Kaiser*, 65 Wn.2d at 462. The accident resulted from the bus driver's loss of consciousness due to the side effects of a drug prescribed by his physician. *Id.* The court considered foreseeability of harm in determining (a) whether the physician's negligence was a proximate cause of the passenger's damages, and (b) whether the bus driver's negligence in failing to stop when he felt groggy constituted a superseding cause. *Id.*, 65 Wn.2d at 464-65.

SGB erroneously argues that the *Kaiser* court found that the doctor owed a duty to the passenger based on the foreseeability of the danger. The court's analysis of the physician's negligence turned upon the evidence in the record that the standard of care in the local professional community required the doctor to give a warning of the drug's side effect. *Id.*, 65 Wn.2d at 464. The existence of the duty was well-established by prior cases. *Id., citing Derr v. Bonney*, 38 Wn.2d 876, 231 P.2d 637 (1951). Nothing in the decision suggests that foreseeability may give rise to a duty where no such duty existed in the first place.

While the cases SGB cites fail to support its foreseeability argument,[2] Viad's position is well founded in the numerous cases from this jurisdiction. The Ninth Circuit has also refused to adopt the argument that foreseeability creates a duty to warn. *See e.g. Kealoha v. E.I. DuPont,* 82 F.3d 894, 901 (9th Cir. 1996)(applying Hawaii law).

By way of brief historical background, E.I. Du Pont De Nemours & Co. ["DuPont"] became the subject of nation-wide mass-tort litigation for its raw plastic product trademarked Teflon. Beginning in 1969, a company called Vitek used Teflon as a component material for its Proplast TMJ Implant [implant]. Vitek invented, designed, and manufactured the implant. It was undisputed that Teflon, as sold by DuPont, was chemically inert and safe for ordinary industrial use. The ultimate implant material, however, comprised of a combination of Teflon with other products, was

[2] *King v. Seattle,* 84 Wn.2d 239, 525 P.2d 228 (1974) did not deal with the existence of a duty, but rather with the question of whether the consequences of the intentional tort by the city were foreseeable. *Shepard v. Mielke,* 75 Wn. App. 201, 877 P.2d 220 (1994) dealt with whether nursing home's duty of ordinary care extended to protect a patient against a rape. The question at hand was not the existence of a duty, but rather whether such duty covered the specific type of harm sustained by the plaintiff. The Court of Appeals remanded to the trial court to determine whether plaintiff's harm was foreseeable. In *Bailey v. Forks,* 108 Wn.2d 262, 737 P.2d 1257 (1987), the court considered whether facts alleged in the complaint fell within the exception to the public duty doctrine. The court did not use foreseeability of harm to create a duty of care, but rather applied foreseeability to determine whether the plaintiff fell within the protected class.

alleged to cause a debilitating tissue reaction to the implant recipients. *Kealoha,* 82 F.3d at 897, 899.

In the early 1990s, hundreds of lawsuits were filed against Vitek, which subsequently was rendered insolvent. Left without Vitek's deep pocket as a source for potential recovery, plaintiffs targeted DuPont as a component manufacturer. In response to this trend, more than twenty federal courts have granted summary judgment to DuPont on virtually identical claims. *Kealoha,* 82 F.3d at 898, n. 3. *See e.g., Jacobs v. DuPont,* 67 F.3d 1219 (6th Cir. 1995); *Anguiano v. DuPont,* 44 F.3d 806 (9th Cir. 1995); *Apperson v. DuPont,* 41 F.3d 1103 (7th Cir. 1994); *LaMontagne v. DuPont,* 41 F.3d 846 (2nd Cir. 1994); and *Klem v. DuPont,* 19 F.3d 997 (5th Cir.1994).

Kealoha is a representative case brought against DuPont in the Ninth Circuit by an individual who sustained injuries from Vitek's TMJ implants. In *Kealoha,* the plaintiff's liability theory was premised on the contention that DuPont had a duty to warn of known dangers posed by the use of Teflon in Vitek's implant devices. *Id.,* 82 F.3d at 899. Applying the raw material supplier defense, the court found no such duty to warn because Teflon, in and of itself, was not unreasonably dangerous, and Teflon was not the product that caused the plaintiff s injury. *Id.*

Similarly to Simonetta, the plaintiff in *Kealoha* ventured to extend the scope of the defendant's duty to warn by applying the notion of foreseeability. The plaintiff argued that DuPont's duty to warn was predicated upon the foreseeability of the risk associated with Vitek implant material of which Teflon was a part. *Id.*, 82 F.3d at 900. The appellate record showed that DuPont was aware that its product was being used in the implant material. Moreover, DuPont's researchers knew that the implant material had the propensity to fragment and deteriorate. *Id.*, 82 F.3d at 897. Presented with evidence that the risk associated with the implants may have been foreseeable to DuPont, the *Kealoha* court reasoned that foreseeability of the risk of the finished product was *irrelevant* to determining whether the component defendant had a duty to warn. Where a component part became potentially dangerous in its ultimate use, the mere fact that the manufacturer of the component part had knowledge of the design of the final product was not a sufficient reason to assign responsibility to the manufacturer of the component part. *Id.*, 82 F.3d at 901 (*citing Childress v. Gresen Mfg. Co.*, 888 F.2d 45, 49 (6th Cir. 1989)(applying Michigan law)).

Kealoha reaffirms the principle that the mere foreseeability that a manufacturer's product may be subsequently used with someone else's defective product is immaterial to the issue of the manufacturer's duty to

warn. The *Kealoha* court properly refused to allow an undue expansion of the duty to warn on the mere basis that the injury could be foreseen. *Id.*, 82 F.3d at 901.

2. The application of asbestos insulation to Griscom-Russell's evaporator did not render the evaporator dangerous

SGB's refers to the warnings by Weber Grill, Clorox bleach and Levitra. These warnings are not part of the record before the Court, and SGB's reliance on them is unpersuasive. The mere fact that such warnings exist does not mean that the manufacturers giving the warnings had a legal duty to warn. Modern manufacturers commonly supply gratuitous warnings regarding their products even though the existing law does make it mandatory. Also, it is fundamentally unfair to compare the warnings given by these contemporary manufacturers to the actions of Griscom-Russell over half a century ago. The fact that some manufacturers chose to provide warnings out of an abundance of caution does not warrant the imposition of a duty to warn upon Griscom-Russell where no legal duty to warn existed.

Additionally, Griscom-Russell's evaporator was principally different from gas ignition grills, Clorox, Levitra, and a litany of products which become dangerous by virtue of interacting with other products. The use of the ignition gas grill with any flammable liquids enhances the

danger of the gas, which is an inherent part of any gas powered grill and can create spontaneous combustion. Clorox bleach produces chlorine gases and creates a threat of chemical exposure when it interacts with vinegar or toilet bowl cleaners. Levitra can cause negative health effects when combined with nitrates *in vivo*. The common thread running through these examples is that the use of one manufacturer's product with the other product enhances the dangers inherent in the first product.

In contrast, the application of asbestos insulation to Griscom-Russell's evaporator did not make the evaporator any more dangerous than before, in the sense that it did not change the evaporator's operational principles or mechanical features. The danger arose exclusively from asbestos insulation and was not enhanced by the evaporator. While flammable fluids and gas present a high risk of spontaneous combustion when used together, vinegar alters the chemical composition of Clorox bleach resulting in the release of poisonous gases, and the combination of Levitra and nitrates increase health risks, there was no interaction between the evaporator and the asbestos insulation rendering the evaporator dangerous. The evaporator is safe with or without insulation. At the same time, high concentrations of respirable asbestos fiber may be equally hazardous to human health, no matter whether they are released from a

naturally occurring asbestos mineral deposit or from external insulation applied to an evaporator, a pipeline, or a brick.

III. CONCLUSION

Viad respectfully requests that this Court affirm the trial court's summary judgment order dismissing Simonetta's failure to warn claims, as well as reverse and vacate the Court of Appeals' decision.

RESPECTFULLY SUBMITTED this 4th day of March, 2008.

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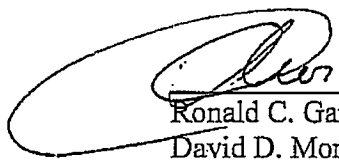

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vs
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DECLARATION OF
EMAILED DOCUMENT
(DCLR)

Defendant/Respondent

I declare as follows:

1. I am the party who received the foregoing email transmission for filing.
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3. My phone number is (360) 754-6595.
4. I have examined the foregoing document, determined that it consists of 17 pages, including this Declaration page, and that it is complete and legible.

I certify under the penalty of perjury under the laws of the State of Washington that the above is true and correct.

Dated: 3/4/08 at Olympia, Washington.

Signature: Ingrid Y. Elsinga

Print Name: Ingrid Y. Elsinga